

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES MEDICRAFT, *et al.*,

Plaintiffs,

V.

STATE OF WASHINGTON, *et al.*,

Defendants.

NO. 21-cv-1263

**ORDER DENYING PLAINTIFFS'
MOTION TO STRIKE OR FOR
PARTIAL SUMMARY JUDGMENT
AND FOR FEES**

I. INTRODUCTION

Currently pending before the Court is Plaintiffs' Motion to Strike or for Partial Summary Judgment and For Fees Against Defendant Phoenix Security, ECF No. 144.¹ Additionally, the Court will also address a related dispute that remained pending after the Court issued its decision on Plaintiffs' motion for partial summary judgment against the State, ECF No. 140. *See* ECF No. 210 at 17, (referring to a dispute as to whether the State is liable for the acts of its third-party

¹ Also pending at this time is Defendant Derek P. Leuzzi and Jane Doe Leuzzi's Second Motion to Dismiss, ECF No. 202 (sealed), which will be addressed in a separate order.

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1 contractor Phoenix). Having reviewed the materials,² the record of the case, and the relevant legal
 2 authorities, the Court will deny Plaintiffs' motion. The reasoning for the Court's decision follows.

3 II. BACKGROUND

4 The parties are familiar with the factual and legal background of this dispute, and the Court's
 5 prior order, ECF No. 210, provides a detailed background, so only a brief summary of facts relevant
 6 to the current dispute will be given. Plaintiffs, the Medicrafts (parents and children), claim they
 7 were wrongfully separated by the State of Washington's Department of Children and Families
 8 ("DCYF"). Defendants include the DCYF, the State of Washington, Phoenix Protective Services
 9 (a state contractor), and individuals³ who are alleged to have been involved in either the children's
 10 separation or their time in State custody. Plaintiffs' operative complaint is their Second Amended
 11 Complaint, ECF No. 55, filed on March 7, 2022.

12 Relevant to the pending motion, Plaintiffs specifically pleaded the following causes of
 13 action against Phoenix:

- 14 • Sixteenth Cause of Action – Vicarious Liability for Assault of JM
- 15 • Seventeenth Cause of Action – Vicarious Liability for Assault of AM
- 16 • Eighteenth Cause of Action – Negligence
- 17 • Nineteenth Cause of Action – Vicarious Liability for Intentional and/or Negligent
 Infliction of Emotional Distress by Shaylee Medicraft, JM, EM, and AM

18 Sec. Am. Compl. ¶¶ 268-79, ECF No. 55.

21 ² Including Plaintiffs' motions, ECF Nos. 140, 144; Defendants' responses in opposition, ECF Nos. 159, 161;
 22 Plaintiffs' replies, ECF Nos. 167, 172; and Defendants' surreply, ECF No. 176; together with multiple exhibits as well
 as prior related motions and responses.

23 ³ Individual State defendants Derek P. Leuzzi, Tanessa Sanchez, Tabitha Culp, Elizabeth Sterbick, Tabitha Pomeroy,
 Ross Hunter, and Bonnie White, and individual Phoenix defendant Lufti Al Marfadi.

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1 By its prior order, ECF No. 210, the Court denied Plaintiffs' motion for partial summary
2 judgment against the State, finding that there are genuine disputes of fact as to Plaintiffs' negligent
3 investigation claim, substantive due process claim, assault and battery claims, and failure to report
4 abuse claim. Further, the Court held that RCW 4.24.595(2) does not provide Defendants immunity
5 from Plaintiffs' claims.

6 In its order, the Court noted:

7 Both parties acknowledge that the children exhibited serious
8 behavioral issues while in the State's custody. These led to
9 escalating problems at school, multiple psychiatric hospitalizations,
and physical altercations with social workers and Phoenix security
guards.
10
11 Plaintiffs do not present any undisputed evidence going to the
elements of assault or battery. . . .

12 The Court notes that the parties' summary judgment briefs
13 also refer to a dispute as to whether the State is liable for the acts of
14 its third-party contractor Phoenix. This dispute is also part of
15 Plaintiffs' motion for partial summary judgment against Phoenix,
16 filed separately from the instant motion against the State
Defendants. The Court will decide this question in a separate order.
Whether Phoenix or the State is liable for alleged assault and battery
is not relevant to this order because there remains a dispute of fact
[] as to whether an assault or battery actually occurred.

17 ECF No. 210 at 3-4, 17 (internal citations omitted).

18 Plaintiffs' pending motion seeks to strike⁴ Phoenix's affirmative defenses: (1)
19 comparative/contributory fault; (2) superseding/intervening cause; and (3) reasonable and lawful
20 force. Reply 1, n.1, ECF No. 167; *see also* Mot. 3, ECF No. 144. Plaintiffs seek fees for their
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⁴ Or alternately, requests a grant of partial summary judgment.

1 having to renew their motion. Mot. 3, 17. Plaintiffs also request summary judgment that Phoenix is
 2 vicariously liable for any-and-all acts of its employees in relation to the Medicraft children.⁵ Mot.
 3; Reply 1.

4 III. LEGAL STANDARD

5 A. Motion to Strike

6 Federal Rule 12(f) provides that a court may strike from a pleading any “insufficient
 7 defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f).
 8 To show that a defense is “insufficient,” the moving party must demonstrate “that there are no
 9 questions of fact, that any questions of law are clear and not in dispute, and that under no set of
 10 circumstances could the defense succeed.” *Sec. & Exch. Comm'n v. Sands*, 902 F. Supp. 1149,
 11 1165 (C.D. Cal. 1995) (citations omitted). Motions to strike a defense as insufficient are often
 12 disfavored by federal courts “because of their somewhat dilatory and often harassing character.”
 13 *Rosen v. Masterpiece Mktg. Grp., LLC*, 222 F. Supp. 3d 793, 797 (C.D. Cal. 2016) (citations
 14 omitted).

15 The purpose of a Rule 12(f) motion to strike is to “avoid the expenditure of time and money
 16 that must arise from litigating spurious issues by dispensing with those issues prior to trial.”
 17 *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (quoting *Fantasy, Inc. v.*
 18 *Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)). A strike motion “will usually be denied unless the
 19 allegations in the pleading have no possible relation to the controversy, and may cause prejudice
 20 to one of the parties.” *Sliger v. Prospect Mortg., LLC*, 789 F. Supp. 2d 1212, 1216 (E.D. Cal. 2011)

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 22 ⁵Phoenix originally asserted vicarious liability as an affirmative defense, but as described herein, withdrew the defense
 23 after Magistrate Judge Peterson clarified that vicarious liability did not need to be pleaded as an affirmative defense.
 See ECF No. 130 at 28; ECF No. 111-1 at 11.

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1 (citing 5A C. Wright & A. Miller, Fed. Prac. and Proc.: Civil 2d 1380). A motion to strike is not
 2 an appropriate procedure for resolving “disputed and substantial factual or legal issue[s],” which
 3 are better brought under Federal Rules 12 or 56. *Whittlestone*, 618 F.3d at 973-74.

4 **B. Summary Judgment**

5 “Summary judgment is appropriate when, viewing the evidence in the light most favorable
 6 to the nonmoving party, there is no genuine dispute as to any material fact” and the movant is
 7 entitled to judgment as a matter of law. *Zetwick v. Cnty. of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017)
 8 (quoting *United States v. JP Morgan Chase Bank Account No. Ending 8215*, 835 F.3d 1159, 1162
 9 (9th Cir. 2016)); Fed. R. Civ. P. 56(a). “The moving party bears the initial burden of identifying
 10 portions of the record that demonstrate the absence of a fact or facts necessary for one or more
 11 essential elements of each claim.” *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 657
 12 (9th Cir. 2020). “If the moving party meets this burden, the opposing party must then set out specific
 13 facts showing a genuine issue for trial to defeat the motion.” *Id.* If the evidence proffered by the
 14 opposing party “is merely colorable, or is not significantly probative, summary judgment may be
 15 granted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted).

16 **IV. DISCUSSION**

17 **A. Plaintiffs’ Motion to Strike Phoenix’s Affirmative Defense of Vicarious Liability**

18 When Phoenix filed its First Amended Answer to Plaintiffs’ Second Amended Complaint,
 19 it included “Vicarious Liability” as its first of four affirmative defenses, stating: “To the extent
 20 Phoenix’s alleged liability is based on its supervisory capacity or role as an employer, Phoenix is
 21 not liable for damages under the doctrine of vicarious liability.” ECF No. 65 at 30. A hearing on
 22 Plaintiffs’ motion to strike Phoenix’s affirmative defenses was held on June 13, 2022, and

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1 Magistrate Judge Peterson ruled that vicarious liability is not an affirmative defense that needs to
2 be pleaded. ECF No. 111-1 at 11. In its Second Amended Answer to Plaintiffs' Second Amended
3 Complaint, Phoenix withdrew the affirmative defense. ECF No. 130 at 28. However, Plaintiffs
4 again move to strike the affirmative defense. Mot. 3. The Court agrees with Magistrate Judge
5 Peterson's ruling, and considering that Phoenix has withdrawn the defense, the Court denies
6 Plaintiffs' motion to strike as moot.

7 **B. Plaintiffs' Motion for Summary Judgment as to Phoenix's Vicarious Liability**

8 Plaintiffs also argue that Phoenix, as a matter of law, is vicariously liable for the acts of its
9 employees. Mot. at 4, 5-8.

10 Before the Court can determine if Phoenix is liable for the actions of the individual
11 defendants, there are many factors that must be determined, i.e., whether the one rendering services
12 is an employee or an independent contractor; thereafter, whether the actions are within the scope of
13 the employee's employment. The determination of these factors are matters of fact to be decided
14 by a jury. *See, e.g., Wilcox v. Basehore*, 187 Wn.2d 772, 784 (2017) (noting that control is generally
15 a question of fact for the jury); *Hollingbery v. Dunn*, 68 Wn.2d 75, 80 (1966) ("[W]here the facts
16 as to the agreement between the parties to the transaction are in dispute or are susceptible of more
17 than one interpretation or conclusion, then the relationship of the parties generally becomes a
18 question to be determined by the trier of the facts.").⁶ There remain material disputes of fact that
19 prevent summary judgment for Plaintiffs on this issue.

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⁶ Further, the Court notes that it has ruled that a material dispute of fact remains as to whether an assault or battery
actually occurred. ECF No. 210 at 17.

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1 Therefore, Plaintiffs' motion for summary judgment as to Phoenix's vicarious liability is
2 denied.

3 **C. Plaintiffs' Motion for Summary Judgment as to the State's Vicarious Liability**

4 By their separate motion, ECF No. 140, Plaintiffs also argue that the State is liable for the
5 acts of the Phoenix security guards engaged as contractors with the State. This related dispute
6 remained pending after the Court issued its decision on Plaintiffs' motion for partial summary
7 judgment against the State. *See* ECF No. 210 at 17.

8 The above reasoning applies with equal force to this motion. There are multiple disputes of
9 fact regarding whether Phoenix or its employees can be considered agents of the State when they
10 were acting as security guards. Therefore, Plaintiffs' motion for summary judgment as to the State's
11 vicarious liability is denied.

12 **D. Comparative/Contributory Fault**

13 Phoenix pled, in pertinent part:

14 Plaintiffs James and Shaylee Medicraft sought to have their
15 minor children misbehave, or "give them hell," to all that they
16 perceived as involved in separating their family unit. As a partial
17 result of this aim, minor Plaintiffs, principally J.M., A.M., and E.M.,
18 repeatedly engaged in a variety of attacks on State workers and
Phoenix employees, including [listing of example behavior]. These
same minor Plaintiffs further engaged in self-threatening behavior
including, but not limited to, running through traffic and intentional
self-injury.

19 . . . To the extent Plaintiffs' allegations against Phoenix for
20 its use of force arise in negligence, the minor Plaintiffs' actions, as
21 well as the adult Plaintiffs' instruction and encouragement of
misbehavior, may be a proximate cause of the incident, and recovery
22 should be reduced by any comparative fault. For purposes of
allocating fault, it is further asserted that adults and minor Plaintiffs'
conduct was reckless and negligent.

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1 Defs.’ Second Am. Answer to Plaintiffs’ Second Am. Compl. 28-29, ECF No. 130.

2 Plaintiffs assert that this affirmative defense must be struck because comparative fault does
 3 not apply to intentional torts. Mot. 8-9. Phoenix asserts that it has limited its defense to allegations
 4 of negligent or reckless acts, such as Plaintiffs’ causes of action for negligence and negligent
 5 infliction of emotional distress. ECF No. 159 at 14.

6 To prevail on their negligence claims, Plaintiffs must first show that there was some
 7 wrongful, tortious conduct by Phoenix’s employee(s), and that Phoenix was negligent in the hiring
 8 or failing to terminate Mr. Al Marfadi and the John Doe Defendants who assaulted the Medicraft
 9 children. Sec. Am. Compl. ¶ 273. “[T]o hold an employer liable for negligently hiring or retaining
 10 an employee who is incompetent or unfit, a plaintiff must show that the employer had knowledge
 11 of the employee’s unfitness or failed to exercise reasonable care to discover unfitness before hiring
 12 or retaining the employee.” *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 356, (2018).

13 Should the individuals alleged to have caused harm be found liable, and Phoenix be found
 14 vicariously liable, or liable for negligent hiring or failing to terminate, Phoenix is entitled to pursue
 15 a defense of comparative fault or contributory negligence to reduce the amount of damages that
 16 Plaintiffs may recover.

17 Therefore, Plaintiffs’ motion to strike Phoenix’s affirmative defense of
 18 comparative/contributory fault is denied.

19 **E. Superseding/Intervening Cause**

20 Phoenix pled, in pertinent part:

21 Plaintiffs’ alleged injuries and damages, if any, may have
 22 been caused by intervening and/or superseding causes. Plaintiffs
 23 have made numerous allegations and causes of action and alleged
 24 physical and emotional damages to Plaintiffs against other

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1 defendants before and after the allegations against Phoenix and its
2 employees. In addition, Plaintiffs have alleged claims against
3 numerous unnamed parties on other incidents before and after the
4 allegations against Phoenix.

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7 To the extent the allegations against the other parties are
8 proven, . . . [s]uch intervening acts constitutes a superseding cause
9 to the extent the intervening acts create a different type of harm than
10 otherwise would have resulted from Phoenix's negligence; the
11 intervening act was extraordinary or resulted in extraordinary
12 consequences; and the intervening act operated independently of
13 any situation created by Phoenix negligence.

14 Defendants' Second Am. Answer to Plaintiffs' Second Am. Compl. 29-30.
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16 Plaintiffs assert that Phoenix's Rule 30(b)(6) designee could not identify any alleged third
17 party who performed any superseding or intervening act. Mot. 12. Phoenix argues that Plaintiffs'
18 motion is premature, especially given that the parties do not yet have the results of the independent
19 medical exams involving the minor Plaintiffs. ECF No. 159 at 20. Plaintiffs cite cases that discuss
20 the provision of instructions to the jury and not the pleading of an affirmative defense, but they also
21 note that Phoenix has not pleaded any "specific" superseding cause. ECF No. 167 at 12-13.
22 Detailed pleading is not necessary to give fair notice to a plaintiff under Fed. R. Civ. P. 8(c), and
23 Phoenix does provide two specific examples: (1) State and DCYF conspired to fraudulently
24 dismantle the Plaintiffs' family unit, and (2) minor Plaintiffs were sexually abused by DCYF agents
25 and other children in its custody. Plaintiffs are on notice of causation issues that may arise as this
litigation proceeds. Whether or not a jury gets instructed on this defense is a discussion for a later
date, but the Court does not find it necessary to strike the defense as pleaded.

26 Therefore, Plaintiffs' motion to strike Phoenix's affirmative defense of
27 superseding/intervening cause is denied.
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1 **F. Reasonable and Lawful Force**

2 Phoenix has also asserted in its affirmative defenses that Phoenix employees used
 3 reasonable and lawful force in one or more of the incidents alleged against them. Phoenix alleges
 4 that its “employees had a right in these situations, and with all contacts with minor Plaintiffs, to use
 5 or attempt to use force upon or toward minor Plaintiffs in defense of the employee, a third-party,
 6 or in protection of the minor Plaintiff” Defs.’ Second Am. Answer to Plaintiffs’ Second Am.
 7 Compl. 30-31.

8 Plaintiffs argue that Phoenix’s allegations are inconsistent with its policies of what
 9 constitutes discipline. Mot. 14. However, Phoenix asserts that this affirmative defense is not based
 10 on discipline but on every individual’s right of self-defense and defense of others. ECF No. 159 at
 11 21. Phoenix has pleaded sufficient detail to give Plaintiffs fair notice of the affirmative defense,
 12 and there are outstanding questions of fact that preclude a finding that the defense is insufficient.

13 Therefore, Plaintiffs’ motion to strike Phoenix’s affirmative defense of reasonable and
 14 lawful force is denied.

15 **G. Fees**

16 Before discussing the merits of Plaintiffs’ motion for fees, a brief discussion of the events
 17 in 2022 leading up to the pending motion will be instructive.

18 Plaintiffs’ Second Amended Complaint was filed on March 7, 2022. ECF No. 55. On
 19 March 28,⁷ when Phoenix filed its Answer to Plaintiffs’ Second Amended Complaint, it included
 20 ten affirmative defenses, ECF No. 63, but after counsel met and conferred, Phoenix filed its First
 21 Amended Answer, pleading four affirmative defenses, ECF No. 65, including “Vicarious Liability”

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 23 ⁷ Dates in this section refer to 2022 unless otherwise noted.

1 as an affirmative defense, ECF No. 65, at 30-31. Plaintiffs prepared a draft motion to strike, counsel
2 for the parties again met and conferred, and on April 28, Plaintiffs filed a motion to strike Phoenix's
3 affirmative defenses. ECF No. 77.

4 A hearing was set for June 13, and from May 13 until the morning of the hearing, Phoenix's
5 counsel sent Plaintiffs' counsel multiple emails proposing that the motion to strike be tabled while
6 Plaintiffs' counsel reviewed Phoenix's proposed draft second amended answer. *See* ECF No. 159
7 at 2-3 (describing at least four follow-up emails). When Plaintiffs' counsel failed to respond,
8 Phoenix filed its response to the strike motion and requested leave to file a second amended answer
9 to refine its defenses further. *Id.* at 203; ECF No. 85. Plaintiffs' counsel did not respond until a
10 few minutes before the hearing, saying that he'd reviewed the draft and still had issues, so the
11 hearing should proceed. ECF No. 159 at 3. When the hearing was held, Magistrate Judge Peterson
12 accepted Phoenix's proposal to continue the motion. Mot. 2-3.

13 Following the hearing, Phoenix's counsel again reached out to Plaintiffs' counsel multiple
14 times, requesting a response identifying Plaintiffs' issues with the proposed second amended
15 answer. ECF No. 159 at 4. When Plaintiffs' counsel responded with a list of objections on July 1,
16 the objections were not responsive to the draft that Phoenix's counsel had provided. *Id.* Phoenix's
17 counsel responded the same day, again attaching the draft second amended answer. *Id.* Counsel
18 finally met on July 19, but they were not able to resolve the issues, and Phoenix's counsel sent a
19 second draft of the second amended answer to Plaintiffs' counsel, asking for specific comments,
20 objections, and questions. *Id.* at 5. Plaintiffs' counsel received no response after multiple follow-
21 ups by email and in person. *Id.*

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1 Plaintiffs' counsel finally sent his objections on the draft to Phoenix's counsel on August
2 22, while Phoenix's counsel was on vacation. *Id.* at 6. Phoenix's counsel returned from vacation
3 on August 29, followed up by email, and a meet and confer was scheduled for the next day to deal
4 with a discovery issue. *Id.* But when they met on August 30, counsel did not discuss the draft or
5 Plaintiffs' objections. *Id.* On September 1, Plaintiffs filed a motion to compel regarding discovery
6 and renewed their motion to strike affirmative defenses. ECF Nos. 103, 110.

7 On September 22, Phoenix filed a motion for leave to file a second amended answer. ECF
8 No. 113. On October 12, Magistrate Judge Peterson heard arguments on the motion to compel and
9 raised the issue of the renewed motion to strike affirmative defenses and the motion for leave to file
10 the second amended answer. ECF No. 159 at 6. By agreement of the parties, the Court granted
11 Phoenix's motion to file a second amended answer and struck Plaintiffs' motion to strike as to the
12 first amended answer, without prejudice. *Id.* at 7. Unaware of the reasons for the delays, Magistrate
13 Judge Peterson raised the potential for Plaintiffs to file a motion for fees for having to renew their
14 motion to strike. *Id.*

15 On October 21, Plaintiffs' counsel sent a letter to Phoenix's counsel requesting a meet and
16 confer on the topic of fees, offering to not file a motion for fees if Phoenix agreed to withdraw its
17 affirmative defenses. Mot. 3; Mot. Ex. 1, ECF No. 145-1. Although Plaintiffs' counsel sent multiple
18 follow-up emails, Phoenix's counsel did not respond. Mot. 3. Plaintiffs filed the pending motion to
19 strike on January 3, 2023, incorporating its prior motions (ECF Nos. 77, 110) and arguments, and
20 adding a motion for fees. Mot. 1, 16-17.

21 Plaintiffs seek fees they incurred in the filing of a renewed motion to strike affirmative
22 defenses. Mot. 16-17. Plaintiffs argue that the Court invited this application for fees. *Id.* However,

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1 as Phoenix points out, Magistrate Judge Peterson invited the motion because she wanted to
2 understand what led up to the delay, but she also stated, “I am not in any way making any sort of
3 determination on whether or not plaintiffs should be entitled to their fees.” ECF No. 159 at 7
4 (quoting October 12, 2022 hearing transcript, ECF No. 155 at 51). Having reviewed the sequence
5 of events leading to the delay and the need for a renewed motion, the Court finds that fees are not
6 appropriate. Phoenix’s counsel made multiple attempts to resolve the issues and get feedback from
7 Plaintiff’s counsel. It is clear that Plaintiffs’ counsel failed to cooperate, and due to that failing, the
8 parties were unable to work together to come to an agreement and avoid the renewed motion. The
9 issues related to affirmative defenses could have, and should have, been addressed solely between
10 the parties, pursuant to Federal Rule of Civil Procedure 1, “to secure the just, speedy, and
11 inexpensive” resolution of this case.

Therefore, Plaintiffs' motion for fees is denied.

V. CONCLUSION

For the foregoing reasons:

1. Plaintiffs' Motion to Strike or for Partial Summary Judgment and For Fees Against Defendant Phoenix Security, ECF No. 144, is DENIED.
 2. The remaining dispute in Plaintiffs' motion for partial summary judgment against the State, ECF No. 140—summary judgment that the State is liable for the acts of its third-party contractor Phoenix—is DENIED.

DATED this 3rd day of July 2023.

Barbara Jacobs Rothstein
Barbara Jacobs Rothstein
U.S. District Court Judge

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